

February 1, 2008

**DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioner: Mary B. Guillory

Date of Filing: January 3, 2008

Case Number: TFA-0238

On January 3, 2008, Mary B. Guillory (Ms. Guillory) filed an Appeal from a determination issued to her by the Department of Energy's Office of Fossil Energy (FE). In that determination, FE withheld documents in response to a request for information that Ms. Guillory filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require FE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.

**I. Background**

On September 17, 2007, Ms. Guillory filed a FOIA request with DOE's Headquarters FOIA Office (DOE/FOI) seeking documents relating to an Office of Inspector General's (IG) investigation case file. *See* Electronic Mail Message from Mary Guillory to DOE (September 17, 2007) (FOIA Request). Specifically, Ms. Guillory requested a DOE IG's referral memorandum sent to the program officer and the program officer's response. *Id.* In a letter dated September 18, 2007, the Director of the DOE/FOI informed Ms. Guillory that her request was being forwarded to IG and FE because any documents responsive to her request, if they existed, would fall under the jurisdiction of those offices.<sup>1</sup>

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<sup>1</sup> FE forwarded Ms. Guillory's FOIA request to the National Energy Technology Laboratory (NETL) to determine if it had responsive documents within its records. NETL conducted a search of its records and determined that it had no documents responsive to Ms. Guillory's request. In response to this Appeal, however, NETL informed us that it conducted an additional search of its records. *See* Electronic Mail Message from Thomas Russial, NETL to Avery Webster, OHA (January 25, 2008). NETL discovered a draft report from Penn State University under its purchase order from NETL which relates peripherally to the subject matter of Ms. Guillory's request. Although this document is marked "draft", it was accepted by DOE as the final report. While it may not be responsive to Ms. Guillory's request, NETL has agreed to provide Ms. Guillory with a copy of this document.

FE conducted a search of its records and located one responsive document. In its determination letter dated December 13, 2007, FE withheld the document in its entirety under the deliberative process privilege of Exemption 5, claiming that the responsive material is predecisional and deliberative because it sets forth opinions and recommendations concerning an IG investigation. *See* Letter from FE to Mary Guillory, December 13, 2007 (Determination Letter).

On January 3, 2008, Ms. Guillory filed the present Appeal<sup>2</sup> with the Office of Hearings and Appeals (OHA). *See* Letter from Mary Guillory to OHA (January 3, 2008) (Appeal Letter). In her Appeal, Ms. Guillory challenges FE's determination and asserts that material was improperly withheld under Exemption 5 of the FOIA.<sup>3</sup> *Id.* For this reason, Ms. Guillory requests that OHA direct FE to release the requested information.<sup>4</sup>

## II. Analysis

### A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding portions of documents from Ms. Guillory, FE relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising

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<sup>2</sup> The determination issued by the Office of Inspector General is not the subject of this Appeal.

<sup>3</sup> On Appeal, Ms. Guillory requests additional information that she did not request in her FOIA request. Specifically, she requests information in DOE's possession "detailing the kind of mercury and [providing] an exact list of the materials, especially the toxins and hazardous materials and ph that was conducted or contracted out by PSU and DOE labs." Under the FOIA, agencies are required only to release non-exempt documents that are responsive to a request for information. If Ms. Guillory seeks additional information, she must file a new FOIA request requesting documents that may provide this information.

<sup>4</sup> Ms. Guillory also argues that the information should be provided to her pursuant to OSHA regulations. However, OHA's jurisdiction is limited to deciding whether DOE properly withheld the documents under the FOIA.

part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id.*

After reviewing the requested documents at issue, we have concluded that the determination made by FE in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from Ms. Guillory is a program office's response to an IG inquiry and consists of comments, recommendations and opinions. The comments, recommendations and opinions contained in the memorandum are clearly predecisional and deliberative. The memorandum was drafted to assist the IG in developing a policy determination regarding the validity of Ms. Guillory's complaint of alleged exposure to toxic material. The memorandum was generated prior to any finding concerning the allegations Ms. Guillory raised in the investigation. In addition, the document reflects the opinions and recommendations of the investigator and other individuals regarding an agency investigation. These comments, recommendations and opinions were subject to further agency review and do not represent the final agency position. Accordingly, we hold that the comments, recommendations and opinions withheld from the responsive material were properly withheld under the Exemption 5 deliberative process privilege.

#### B. Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); see *Greg Long*, 25 DOE ¶ 80,129 (August 15, 1995) (Case No. VFA-0060). In the case at hand, the majority of the material withheld under Exemption 5 is nonfactual in nature and is composed of the preliminary opinions of the individuals concerned as to the validity of the allegations or to the future course of the investigation. Any factual information contained in this document is so intertwined as to make segregation virtually impossible.

#### C. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the withheld material in the documents at issue,

which consist of comments, opinions and recommendations provided to the IG during the course of an internal investigation. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (March 18, 1987) (Case No. KFA-0080).

### **III. Conclusion**

Given the facts presented to us, we find that FE properly withheld the responsive document pursuant to the deliberative process privilege of Exemption 5. Accordingly, Ms. Guillory's Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Mary B. Guillory, OHA Case No. TFA-0238, is hereby denied.
- (2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: February 1, 2008